No. 02-571

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EBONY PATTERSON, *et al.*,
PETITIONERS,

v.

JENNIFER GRATZ AND PATRICK HAMACHER,
RESPONDENTS,

and

LEE BOLLINGER, JAMES J. DUDERSTADT, AND
THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN CONDITIONAL OPPOSITION TO CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

Whether public institutions of higher education may consider race and/or ethnicity as one of many factors in making admissions decisions in order to serve the compelling interest of remedying the lingering present effects of past discrimination.

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This petition arises out of a lawsuit that presents a challenge to the University of Michigan's College of Literature, Science, and the Arts' admissions program, which takes race and ethnicity into account as one of many factors in making admissions decisions. Respondents, the Board of Regents of the University of Michigan, Lee Bollinger, and James J. Duderstadt, hereby conditionally oppose the petition for a writ of certiorari before judgment.

This petition is related to two other petitions pending before this Court, *Grutter v. Bollinger*, No. 02-241, and *Gratz v. Bollinger*, No. 02-516. Petitioners here purport to present two questions: (1) whether race may be considered to achieve the educational benefits of diversity; and (2) whether race may be considered to remedy the present effects of past discrimination. Insofar as this petition purports to raise the first question, it merits no separate consideration. That question is clearly before this Court in *Gratz*, a case in which Petitioners here are Respondents. Accordingly, the only independent question actually presented is whether race may be considered to remedy the present effects of past discrimination.

This case—like *Gratz*—seeks certiorari before judgment in the court of appeals, which this Court's Rule 11 provides shall be granted only on a showing that the "case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." This petition, standing alone, does not satisfy that rigorous standard, for the same reasons Respondents set forth in their Conditional Opposition to the Petition for a Writ of Certiorari in *Gratz*.

As Respondents stated therein, if this Court were to grant the petition in *Grutter*, it would be appropriate also to grant review in *Gratz* to some, but not all, of the appeals. If this Court were to grant review in *Gratz*, Respondents do not oppose this petition for a writ of certiorari before judgment with respect to appeal No. 01-1438.

STATEMENT OF THE CASE

Factual Background

The University has made an educational judgment that a broadly diverse student body is an essential component of its educational mission because it "increase[s] the intellectual vitality of [its] education, scholarship, service, and communal life." Pet. App. 4a (internal quotations and citation omitted).[1] Thus, to "facilitate the University's goal" of obtaining the educational benefits of diversity, the College of Literature, Science, and the Arts ("LS&A") considers race and ethnicity as one of many factors as it "strives to compose a class of students" that is broadly diverse. *Id.*

The Brief in Conditional Opposition to Certiorari Before Judgment in *Gratz* sets forth in detail the admissions systems employed by LS&A to obtain the educational benefits of diversity. Respondents in this case will not repeat those facts, but incorporate them by reference.

Procedural History

Plaintiffs Jennifer Gratz and Patrick Hamacher, both of whom are white, were unsuccessful applicants for admission to LS&A for the classes that enrolled in 1995 and 1997, respectively. On October 14, 1997, Plaintiffs brought this action on behalf of a class of similarly-situated applicants. The complaint asserted that the admissions policy of LS&A violates the Fourteenth Amendment's Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. §§ 1981, 1983. The plaintiffs sought declaratory and injunctive relief, and compensatory and punitive damages against the Board of Regents of the University of Michigan, as well as Lee Bollinger and James J. Duderstadt, both of whom are former presidents of the University of Michigan.

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[1] Citations to "Pet. App." are to the appendix to the petition in *Gratz v. Bollinger*, No. 02-516.

On February 5, 1998, a group of seventeen African-American and Latino students who applied, or intended to apply, for admission to the University of Michigan, along with Citizens for Affirmative Action's Preservation, a nonprofit organization that seeks to preserve opportunities in higher education for African-American and Latino students, moved to intervene as defendants in the case. The district court denied the motion to intervene. The court of appeals reversed that denial on an interlocutory appeal (heard along with an appeal from the denial of intervention in *Grutter*). *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). The defendant intervenors are the Petitioners in this case.

By an order dated December 23, 1998, the district court certified a class, pursuant to Fed. R. Civ. P. 23(b)(2), of those applicants who applied for and were denied admission to LS&A and who "are members of those racial and ethnic groups, including Caucasian, that defendants treat less favorably on the basis of race in considering their application for admission." Pet. App. 3a & n.2. The district court also bifurcated the case into separate liability and damages phases. On September 26, 2000, the Sixth Circuit denied the University's petition for interlocutory review of the district court's certification order, pursuant to Fed. R. Civ. P. 23(f).

Following extensive discovery, on December 13, 2000, the district court issued an opinion granting, in part, cross motions for summary judgment. The district court concluded, following Justice Powell's opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), that the University of Michigan has a compelling interest in seeking to obtain the educational benefits that flow from a student body that is diverse in many ways, including with respect to racial and ethnic diversity. Pet. App. 27a-28a. In reaching that conclusion, the district court also determined that, through the unrebutted reports of nationally-renowned experts in history, sociology, psychology, and education, the

University had presented "solid evidence" of the educational benefits of diversity. *Id.* at 22a-25a.

The district court noted, however, that "Justice Powell's opinion in *Bakke* fails to set forth any bright line regarding what constitutes a permissible consideration of race in admissions decisions," and that it "is often a thin line that divides the permissible from the impermissible." *Id.* at 34a (footnote omitted). The district court concluded that the admissions programs in operation in 1999 and 2000 satisfied the requirements set forth in *Bakke* and were therefore constitutional, whereas the systems in place from 1995 through 1998, taken together, "cross that thin line from the permissible to the impermissible." *Id.* The district court also granted the individual defendants' motions for summary judgment on qualified immunity grounds, holding that a reasonable official in the position of the individual defendants might not have known that the admissions systems in place from 1995 to 1998 would be found unconstitutional.

On January 10, 2001, the plaintiffs and defendants jointly requested that the district court, in connection with the entry of an order reflecting the conclusions set forth in its December 13, 2000 opinion, certify interlocutory cross-appeals pursuant to 28 U.S.C. § 1292(b). The district court, by order dated January 30, 2001, did so. On February 9, 2001, the district court also entered final judgment, pursuant to Fed. R. Civ. P. 54(b), in favor of the individual defendants who had prevailed on their qualified immunity defenses.

Following the district court's § 1292(b) certification of questions arising from its January 30, 2001 order, the plaintiffs and defendants each petitioned the court of appeals to permit the interlocutory appeals to proceed. By order dated March 26, 2001, the court of appeals granted the petition and cross-petition. Those appeals are pending in the court of appeals as Nos. 01-1416 and 01-1418. The plaintiffs also filed a notice of appeal, No. 01-1333, pursuant to 28

U.S.C. § 1292(a), with respect to the final order dismissing the claims against the individual defendants and denying the requested injunctive relief. Those three appeals were subject to consolidated briefing and argument in the court of appeals.

In a separate opinion, dated February 26, 2001, the district court rejected the arguments advanced by the intervening defendants that LS&A's consideration of race as a factor in admissions could be justified as a means to remedy the present effects of past discrimination. By order dated March 21, 2001, the district court also separately entered final judgment under Fed. R. Civ. P. 54(b) with respect to the claims of the intervening defendants, thereby permitting those defendants to bring an interlocutory appeal from its summary judgment rulings. The intervening defendants filed a notice of appeal as to the district court's order rejecting their defenses. That appeal, No. 01-1438, was briefed separately from the other three appeals in *Gratz*, but argued along with those appeals.

All four appeals were argued before the *en banc* court of appeals on December 6, 2001—the same date that the court heard argument in *Grutter*. The court of appeals issued its decision in *Grutter* on May 14, 2002. In that opinion, the court of appeals noted that it would "address the challenge to the University of Michigan's admissions policy, *Gratz v. Bollinger*, Nos. 01-1333, 01-1416, 01-1418, 01-1438, in a forthcoming opinion." *Grutter* Pet. App. 4a n.2. The court of appeals has not yet decided the *Gratz* case.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED FOR THE SAME REASONS SET FORTH IN CONDITIONAL OPPOSITION TO CERTIORARI BEFORE JUDGMENT IN *GRATZ*.

As Respondents stated in their Conditional Opposition in *Gratz* (No. 02-516), if this Court denies the petition in *Grutter* (No. 02-241), it should deny the petition for

certiorari before judgment in *Gratz*. If the *Gratz* petition is denied, then it follows that this petition for certiorari before judgment should be denied as well. The standard for granting certiorari before judgment is very demanding. "A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. Rule 11.

Assuming this Court denies the petitions for certiorari in *Grutter* and *Gratz*, nothing else presented in this petition even remotely suggests that the rigorous standard set forth in Rule 11 and this Court's cases regarding certiorari before judgment is satisfied. For that reason, this petition should be denied.

II. IN THE EVENT THIS COURT GRANTS CERTIORARI IN *GRUTTER* AND *GRATZ*, RESPONDENTS DO NOT OPPOSE THIS PETITION.

As stated in the Conditional Opposition in *Gratz*, if this Court were to grant the petition in *Grutter*, Respondents assert that that it would be appropriate to grant certiorari before judgment in *Gratz* in some, but not all, of the appeals now pending in the court of appeals. In the event the Court grants the petition in *Gratz*, Respondents do not oppose certiorari before judgment on appeal No. 01-1438 on the question whether the University of Michigan's admissions programs may be justified as a remedy for the present effects of past discrimination.

CONCLUSION

If (and only if) this Court grants certiorari in both the related cases of *Grutter v. Bollinger*, No. 02-241, and *Gratz v. Bollinger*, No. 02-516, then Respondents do not oppose this petition. Otherwise, for the foregoing reasons, the petition for a writ of certiorari before judgment should be denied.

Respectfully submitted,

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